(b)(6)

**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

DATE MAY 2 4 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition and dismissed the subsequent motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology company. It seeks to permanently employ the beneficiary in the United States as a system/software engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

As required by statute,[2] the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). is the entity that filed the labor certification on behalf of the beneficiary. The priority date of the petition is November 18, 2008.[3]

At issue on appeal is whether the petitioner is a successor-in-interest to the labor certification employer,

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4]

## I. FACTUAL AND PROCEDURAL HISTORY

On November 18, 2008, filed a labor certification on behalf of the beneficiary for the position of system/software engineer.

On June 7, 2011, the DOL approved the labor certification filed by
On August 18, 2011, the petitioner filed the instant petition based on that labor certification.

---

[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States.

[2] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[3] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

[4] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petition contained an August 1, 2011 letter on the petitioner's letterhead from First Line Manager. The letter states:

> On June 16, 2010, a publicly held company based in Chicago, Illinois was outsourced by the world's largest information technology company. . . . Assets will now be managed as a strategic component of

The petition also contains a "Successor In Interest Statement" by Quality Manager, dated April 23, 2010.[5] This document states:

1. On June 16, 2010, will outsource a publicly held company based in Chicago, Illinois, in an all-cash transaction.

2. Approximately 65 employees will become employees and be transferred to the payroll to work in comparable positions at

3. will be the successor-in-interest employer, as it will assume all the immigration related obligations and liabilities for these employees.

There was no mention of the transaction in the petitioner's 2010 annual report submitted with the petition.

On February 6, 2011, the director issued a request for evidence (RFE) instructing the petitioner to fully describe and document the claimed successor-in-interest transaction with , including, *inter alia*, a copy of the acquisition agreement. The RFE also stated:

> The evidence provided must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner of the predecessor . . . . Contractual agreements or other arrangements in which two or more business entities agree to conduct business together or agree to provide services to each other without the valid transfer of the ownership of the predecessor to the successor do not create a valid successor-in-interest relationship for I-140 purposes.

Counsel's RFE response stated that the director failed to follow the August 2009 U.S. Citizenship and Immigration Services (USCIS) policy memorandum which clarifies that a successor-in-interest

---

[5] The document states that it is a "Sworn Statement" by but there is no evidence that this is an accurate claim. The document is not notarized by a notary public nor signed by the author.

does not have to assume all of the predecessor's assets, liabilities, duties and obligations.[6] Counsel claimed that the petitioner acquired 65 of the predecessor's employees, and that these employees are assets who possess proprietary information. Counsel also stated that ' has completely assumed the responsibilities for managing these former employees. As such, all employees have merged into infrastructure where they are now full-time employees." Accordingly, counsel contends that the petitioner is therefore a successor-in-interest in relation to these employees. The RFE response also contained the petitioner's 2010 Form 10-K, 2010 annual report, and a copy of the USCIS policy memorandum pertaining to successor-in-interest determinations. The 2010 Form 10-K submitted with the RFE response did not mention the acquisition.

The director denied the petition on November 22, 2011. The decision concludes that the petitioner failed to submit requested evidence documenting the transaction that the petitioner claims makes it a successor-in-interest to the predecessor. The decision also states that an outsourcing agreement does not give rise to a successor-in-interest relationship for I-140 purposes.

The petitioner filed a motion to reopen and reconsider the director's decision on March 15, 2012. The motion did not contain any documentary evidence of the transaction. The director dismissed the motion to reopen and reconsider for failing to meet the requirements of a motion as set forth at 8 C.F.R. § 103.5(a).[7]

The petitioner appealed the director's decision to the AAO on May 7, 2012. The brief in support of the appeal reiterates counsel's claims from the petition and the motion to reopen and reconsider. The appeal did not contain any documentary evidence of the transaction.

## II. LAW

A labor certification involving a specific job offer is valid only for the particular job opportunity stated on the labor certification application form. 20 C.F.R. § 656.30(c)(2). If the petitioner is a different entity than the employer named on the labor certification, then it must establish that it is a successor-in-interest to the labor certification employer. *See Matter of Dial Auto Repair Shop, Inc.,*

---

[6] Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, HQ 70/6.2, AD 09-37, *Successor-in-Interest Determinations in Adjudication of Form 1-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)* (Aug. 6, 2009).

[7] A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

19 I&N Dec. 481 (Comm'r 1986) (*Matter of Dial Auto*). Pursuant to an inter-agency agreement between the DOL and legacy Immigration and Naturalization Service (INS), the DOL delegated to INS the authority to amend certain employer-related information on approved labor certifications and to determine if a petitioner is a successor-in-interest to the employer named on the labor certification.[8]

There are no statutory or regulatory provisions that address successor-in-interest determinations for employment-based immigrant visa petitions. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto*, a binding, legacy INS decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of *Matter of Dial Auto* are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto Repair Shop claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

> Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations*, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-83 (emphasis added).

*Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader:

---

[8] *See* DOL Field Memorandum No. 47-92, *Amending Labor Certification Applications,* on July 14, 1992 (57 FR 31219). The memorandum states that "[t]his agreement was entered into because of INS's extensive experience in determining whether an entity is the same employer after a change such as a sale, merger or reorganization."

"[O]ne who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest"). A petitioner is not precluded from being a successor-in-interest simply because it did not acquire *all* of the predecessor's rights, duties, obligations, and assets.

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.[9] *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification. *See e.g., Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984).

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets or asset transaction, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property—such as real estate, machinery, or intellectual property—to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business. *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

In addition, the mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See id.*; *see also* 20 C.F.R. § 656.12(a).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three

---

[9] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or the relevant parts of, the predecessor employer. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it can establish eligibility for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also acquired the essential rights and obligations of the predecessor necessary to carry on the acquired business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same area of intended employment,[10] and the successor's essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the successor must support its claim with all necessary evidence, including evidence of ability to pay. The successor must demonstrate the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

## III. ANALYSIS

The issue on appeal is whether the petitioner has fully described and documented the transaction transferring ownership of all, or the relevant parts of, the predecessor employer; and whether the petitioner has acquired the essential rights and obligations of the predecessor necessary to carry on the acquired business.[11]

---

[10] A labor certification is valid only for the area of intended employment stated on the labor certification form. 20 C.F.R. § 656.30(c)(2). The term "area of intended employment" is defined as "the area within normal commuting distance" of the address of intended employment, such as within a Metropolitan Statistical Area or a Primary Metropolitan Statistical Area. 20 C.F.R. § 656.3.

[11] In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the requested benefit. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Id.*

As is detailed above, the petitioner has not documented the claimed transaction with the labor certification employer. The petitioner has had multiple opportunities to supplement the record with documentary evidence of the transaction and had declined to do so, even when specifically requested by the director.[12] The statements of do not sufficiently describe and document the transaction. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.[13] Further, counsel's claims are also insufficient to meet the burden of proof.[14]

The AAO also concurs with the director that the outsourcing agreement, as generally summarized in the record, would not give rise to a successor-in-interest relationship. The labor certification employer, appears to have outsourced an IT function to the petitioner. This would involve paying the petitioner for providing IT services. While the petitioner may have hired former employees of to assist in the performance this function due to their knowledge of and experience with the company, this transaction would not constitute a transfer of ownership where the successor not only purchased assets from the predecessor, but also acquired the essential rights and obligations of the predecessor necessary to carry on the acquired business.

Therefore, it is concluded that the petitioner has not fully described and documented the transaction transferring ownership of all, or the relevant parts of, the predecessor employer; nor has the petitioner established that is acquired the essential rights and obligations of the predecessor necessary to carry on the acquired business.

## IV. CONCLUSION

In summary, the evidence in the record does not establish that the petitioner is a successor-in-interest to the labor certification employer. Therefore, the labor certification filed by is not valid for this petition. The director correctly denied the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER**: The appeal is dismissed.

---

[12] Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

[13] *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

[14] The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).